

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Examiner: E. B. Elhilo; Art Unit: 1796; Docket No.: 3643

In RE: Application of J. SCHMENGER, et al

Ser. No.: 10/584,935

Filing Date: July 3, 2006

July 8, 2008

**DECLARATION OF FACTS FILED UNDER 37 C.F.R. 1.132 TO
OVERCOME REJECTION UNDER 35 U.S.C. 103 (a)**

Hon. Commissioner of Patents
and Trademarks,
Washington, D.C. 20231

Sir:

In response to the Office Action dated April 10, 2008 and in addition to the accompanying amendment, please accept the following showing of experimental facts, which supports the patentability of the subject matter claimed in the claims of the above-identified U.S. Patent Application:

WHEREAS WE, Jürgen **SCHMENDER** and Jolanthe **KUJAWA**, citizens of Germany, whose post office addresses and residencies are, respectively, Heinrich-Ruehl Strasse 38a, D-64331 Weiterstadt, Germany, and Schulzweg 5, D-64298 Darmstadt, Germany; have applied for Letters Patent for a new and improved

NACREOUS COLORANT FOR KERATIN FIBERS

in a U.S. Patent Application, Ser. No.10/584,935, filed July 3, 2006, of which claims 1 to 5 and 7 to 13 were rejected in an Office Action dated April 10, 2008 under 35 U.S.C. 103 (a) over US Published Patent Application 2004/0019982 A1 of D. Pratt, et al, published February 5, 2004, in view of US Patent 6,372,203 B1, issued April 16, 2002, to J. Allwohn, et al; of which claim 6 was rejected as obvious over US Published Patent Application 2004/0019982 A1 of D. Pratt, et al, published February 5, 2004, in view of US Patent 6,372,203 B1, issued April 16, 2002, to J. Allwohn, et al, and further in view of US Patent 6,015,574, issued January 18, 2000 to D. W. Cannell, et al; and of which claims 1 to 13 were rejected as obvious under 35 U.S.C. 103 over German Patent DE 38 34 142, published April 12, 1990. W. Abels, et al, inventors; Wella AG, applicant.

WHEREAS WE have evaluated the appearance of samples of dye carrier compositions containing a combination of fatty alcohol, alkanolamide, alkoxylate, and anionic surfactant ingredients in amounts as claimed in the new independent claims 14 and 26 filed in the accompanying amendment and of a sample of a dye carrier composition containing a combination of the same four ingredients but in amounts that are not as claimed in claims 14 and 26 in the accompanying amendment, and we have found that the samples of the dye carrier compositions according to new claims 14 and 26 exhibit a nacreous luster and the sample of the dye carrier composition that is not according to the claimed invention does not have a nacreous luster.

WHEREAS WE have evaluated samples of two compositions containing a combination of fatty alcohol, alkanolamide, alkoxylate, and anionic surfactant ingredients with respective amounts within corresponding amount ranges as claimed in the new independent claims 14 and 26 filed in the accompanying amendment and a sample of one composition that contains a combination of the same four ingredients but in which one of the four ingredients is present in an amount that is not within the amount range for that ingredient according to new claims 14 and 26 by visual observation by a panel of experts, by comparing color photographs of the samples, and by photo-microscopy, and

we have found that only the two compositions according to the claimed invention of new claims 14 and 26 exhibit a nacreous luster effect.

WHEREAS WE have evaluated by visual observation by a panel of experts, by comparing color photographs, and by photomicroscopy samples of two compositions containing a combination of fatty alcohol, alkanolamide, alkoxylate, and anionic surfactant ingredients with respective amounts within corresponding amount ranges as claimed in the new independent claims 14 and 26 filed in the accompanying amendment and a sample of a composition that contains a combination of the same four ingredients but in which the amount of the alkanolamide is outside of its amount range as claimed in the new claims 14 and 26, and we have found that only the two compositions in which all the amount ranges for all four ingredients are within the claimed amount ranges have a nacreous luster; the composition that contains an amount of alkanolamide that is outside its amount range according to new claims 14 and 26 does **not** have a nacreous luster effect.

I. COMPARATIVE TESTS

The following three compositions (Examples 1, 1A and 1B) were prepared. To improve recognizability during the microscopic research compositions without dyes were used.

| | Example 1 (according to the invention) | Example 1A (according to the invention) | Example 1B (<u>not</u> according to the invention) |
|--|---|--|---|
| Cetylstearyl alcohol | 8.00 g | 8.00 g | 8.00 g |
| Glycol distearate | 2.00 g | 2.00 g | 2.00 g |
| Ceteareth-25 | 4.00 g | 4.00 g | 4.00 g |
| PEG-7 glyceryl cocoate | 4.00 g | 4.00 g | 4.00 g |
| Cocosfattyacidmonoethanol- amide (Cocamide MEA) | 8.00 g | 6.10 g | 5.00 g |
| sodium lauryl ether sulfate | 8.00 g | 8.00 g | 8.00 g |
| acrylates copolymer | 0.50 g | 0.50 g | 0.50 g |
| Polyquatemium-10 | 0.30 g | 0.30 g | 0.30 g |
| Perfume | 0.25 g | 0.25 g | 0.25 g |
| Ammonia | 9.10 g | 9.10 g | 9.10 g |
| Ethylenediaminetetraacetate- disodium salt | 0.10 g | 0.10 g | 0.10 g |
| ascorbic acid | 0.30 g | 0.30 g | 0.30 g |
| sodium sulfite | 0.40 g | 0.40 g | 0.40 g |
| water | ad 100.00 g | ad 100.00 g | ad 100.00 g |

The nacreous luster effect and homogeneity/stability of these three compositions were evaluated 1) visually without instruments by a group of cosmetics experts, 2) photographically by taking photographs of samples of the three compositions placed

between to two glass panes, and 3) microscopically by taking photomicrographs of samples of the three compositions.

II. TEST RESULTS

1. Visual Evaluation of the Test Compositions by a Group of Experts

The results of a visual inspection of the tested samples of the compositions 1, 1A and 1B by a panel of cosmetics experts are summarized in the following statements.

- a) The composition according to the invention of example 1 has a homogeneous, cosmetic, natural glossy appearance with a distinctive nacreous luster.
- b) The composition according to the invention of example 1A - in which the amount of cocosfattyacidmonoethanolamide is at the lower limit according to the invention - is slightly inhomogeneous, but has a clearly better cosmetic appearance than example 1B that is not of the invention; also the composition of example 1A has a nacreous luster.
- c) The composition not according to the invention of example 1B is inhomogeneous, has an uncosmetic, unglamorous appearance and does not have any nacreous luster.

2. Photographic Evaluation of the Three Compositions between Two Glass Panes

The accompanying "exhibit 1", which comprises photographs of samples of the three compositions placed between two glass panes, clearly shows that the composition not according to the invention of example 1B is not stable and has a tendency toward phase separation (formation of cords, no precise outer contour), whereas the compositions according to the invention of examples 1 and 1A are stable and show no phase

separation.

3. Microscopic Evaluation of the Three Test Compositions

The accompanying “exhibit 2” comprises three photomicrographs of the three samples of the test compositions. The results are summarized by the following statements.

- a) The composition according to the invention of example 1 has an optimum nacreous luster effect, which is shown by the presence of big needles in the sample, which are able to perfectly refract and reflect the light.
- b) The composition according to the invention of example 1A - in which the amount of cocosfattyacidmonoethanolamide is at the lower limit according to the invention - has a nacreous luster, which is not as intense as that of the composition of example 1; it has a cruder structure of the needles.
- c) The composition not according to the invention of example 1B has no nacreous luster effect, because the very fine needles are unable to refract and reflect the light.

III. CONCLUSION

The above-described test results by three different observation methods clearly show that the dye carrier compositions will only have a perfect, stable nacreous luster when the four ingredients of the claimed combination according to new claims 14 and 26, namely the fatty alcohol, alkanolamide, alkoxylate, and anionic surfactant, are within the claimed amount ranges. On

the other hand, dye carrier compositions that contain the same four ingredients, namely the same fatty alcohol, alkanolamide, alkoxylate, and anionic surfactant, but not within the amount ranges as claimed in new claims 14 and 16, do not have a stable, visible nacreous luster.

I HEREBY DECLARE AND AFFIRM THAT ALL STATEMENTS made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code, and that such willful false statement may jeopardize the validity of the above-named application, any patent issuing thereon or any patent to which this Declaration is directed.

DATE

Jürgen SCHMENGER

Jolanthe KUJAWA